

Ordinance No. _____

STREAMSIDE PROTECTION STANDARDS
AND PERMITTING PROCESS FOR ALL MADISON COUNTY WATERWAYS
EAST OF THE TOBACCO ROOT AND GRAVELLY MOUNTAINS, INCLUDING
THE MADISON RIVER VALLEY

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Section 1. Purposes

1. Protect the water quality, floodplain, and riparian resources of all Madison County waterways east of the Tobacco Root and Gravelly Mountains, including the Madison River Valley; and
2. Protect the visual resources enjoyed from these waterways; and
3. Provide for the health and safety of the residents of Madison County.
4. In support on the above, institute a series of building setback restrictions.

Section 2. Authority

The general authority of Madison County Board of Commissioners and their ability to make and enforce rules are broadly described in 7-5-2101 and 2102, MCA.

On May 30, 2007, in support of the guiding principles identified in the Madison County Growth Policy, the Madison County Board of Commissioners adopted the Madison Valley Growth Management Action Plan. This Action Plan specifically recommended the “use of building setbacks to protect rivers and streams” including “land not subject to subdivision review.”

Section 3. Definitions

For the purposes of this Ordinance, the following definitions shall apply:

Buffer Area or Zone: A landscaped area or area of natural vegetation which is intended to separate uses, partially obstruct the view between uses, and/or serve as an attractive boundary.

Building: A structure having a roof supported by walls or columns, or other supports intended for the shelter or enclosure of person, animals, or moveable property.

Ephemeral Stream: a drainageway that flows only in response to precipitation in the immediate watershed or in response to the melting of snow or ice and is always above the local water table.

Floodplain: an area adjoining a stream that would be covered by floodwater of a 100-year (base) flood.

Intermittent Stream: a stream or reach of a stream that is below the water table for at least some part of the year and that obtains its flow from both ground water discharge and surface runoff.

Madison River: that portion of the Madison River, its main stem and all braids and side channels with established floodplains. This Ordinance applies to property within the jurisdiction of Madison County only.

Madison River Watershed: a north-flowing, naturally drained area that supplies water to the Madison River with boundaries defined by the Madison Mountain Range on the east, the Gravelly Range and south end of the Tobacco Root Mountains on the west, the Continental Divide to the south and the Missouri River to the north. This Ordinance applies to property within the jurisdiction of Madison County only.

~~*Nonconformance:* a use, structure or condition of the land which was lawful prior to adoption and/or amendment of a new regulation, and allowed to remain. (1)~~

Ordinary High Water Mark: the line that water impresses on land by covering it for sufficient periods to cause physical characteristics that distinguish the area below the line from the area above it. Characteristics of the area below the line include, when appropriate, but are not limited to, deprivation of the soil of substantially all terrestrial vegetation and destruction of its agricultural vegetative value. A floodplain adjacent to surface waters is not considered to lie within the surface waters' high-water marks (23-2-301, MCA)

***Pre-existing Building:* a structure located within the setback area and constructed before (adoption date of the ordinance). (1)**

Perennial Stream: a stream that historically has flowed continuously during all seasons of the year, during dry as well as wet years.

Riparian Area: The banks and adjacent areas of water bodies, watercourses, seeps and springs whose waters provide a more moist habitat than that of adjacent uplands. Riparian areas integrate the interactions of virtually all the physical, vegetative, and biologic components of a watershed. Riparian areas have: (1) distinctively different vegetative species than adjacent areas; and/or (2) species similar to adjacent areas but exhibiting more vigorous or robust growth forms. They are considered transitional areas between aquatic and upland habitats. Riparian vegetation is associated with the natural presence of surface waters, rather than manmade practices such as irrigation.

Riverbank Stability Area: That area from the top of the stream banks to the water's edge covered by all types of vegetation that reduces erosion and floodwater velocity, while supporting bank shear strength and stream channel morphology.

Setback: The minimum distance that buildings may be located from rivers or riparian areas. Setbacks may be measured from the ordinary high water mark for named rivers or from the bank for other waterways.

Stream: a natural watercourse of perceptible extent that has a generally sandy or rocky bottom or definite banks and that confines and conducts continuously or intermittently flowing water.

Streamside Protection Standards Review Board (hereinafter referred to as "the Review Board"): The eleven member Madison Country Planning Board .

Structure: Anything constructed or erected.

Watershed: A geographic area in which water, sediments, and dissolved materials drain to a common outlet – a point on a larger stream, a lake, an underlying aquifer, an estuary, or an ocean. The area is also called the drainage basin of the receiving water body.

Waterway: a watercourse in which water flows either continuously or intermittently and has a definite channel, bed, or bank.

Section 4. Jurisdictional Area

The jurisdiction of this Ordinance shall apply to all property within Madison County, east of the Tobacco Root and Gravelly Mountains, including the Madison River Valley, as shown in Exhibit A.

Section 5. Compliance

Construction setbacks pertain to all **new** buildings. No building shall be located, extended, or structurally altered without full compliance of the terms of this

ordinance. **Refer to Section 13 – Exceptions.** ~~This Ordinance does not apply to landscaping, fencing, road building, or grading activities. This Ordinance only applies to streams defined as perennial or intermittent – not ephemeral.~~ **(These items moved to Section 13 – Exceptions) (2)**

Section 6. General Standards

All building activity adjacent to a waterway will be reviewed by the County Planning Office for compliance with the following criteria:

- A. Establishment of an appropriately-sized buffer area by requiring a setback of;
 - 1. 500 feet from the ordinary highway mark of the Madison River,
 - 2. 150 feet from the ordinary high water mark of the Jefferson and South Boulder Rivers, and
 - 3. 100 feet from the bank of all other waterways
- B. Compliance with state and local sanitation requirements and water quality standards (as per Title 7, Chapter 13; Title 75, Chapters 5 and 6; Title 76, Chapter 4, MCA);
- C. Compliance with local, state, and federal floodplain regulations and other applicable Ordinances

Section 7. Permitting Process

Prior to initiating any building construction or alteration activity on within the vicinity of a streamside buffer area, the property owner must request a compliance review to determine if a setback permit is required. For purposes of this ordinance, vicinity is defined as the distance equal to the applicable setback restriction increased by fifty (50) percent. In the event a permit is needed, the applicant shall complete and submit the Streamside Protection Permit Application provided by the Madison County Planning Department. Applications shall be submitted, reviewed, and acted upon as follows:

- A. The permit application shall be submitted to the County Planning Office. There is no permit review fee.
- B. The County planning staff will review the application for compliance with this Ordinance.
- C. The County planning staff may consult with pertinent local, county, state, and federal agencies during its review of the proposed building.
- D. After consultation with the County Floodplain Administrator and Conservation District Manager, the County Planner may determine that an independent professional engineering review is needed. When such review is required, the applicant/property owner shall be required to pay all

- independent professional engineer review fees. Review shall be suspended until the completed engineering review is submitted to the County Planning Department.
- E. The applicant shall allow County representatives to visit the site as a part of their review as necessary.
 - F. Within 10 working days of receipt of a complete application, including the results of a professional engineering review if required, the County planning staff shall approve, conditionally approve, or deny a permit for any proposed structure.
 - G. If the application is denied, a written notice of the denial shall be mailed to the applicant and shall include an explanation of the basis for the denial. In the event of conditional approval, the applicant must submit a detailed construction plan addressing all conditional requirements prior to the County's issuance of the permit.
 - H. Within one year of permit issuance, County Planning Staff shall schedule a follow-up site inspection with the property owner to confirm compliance with permit.

Section 8. Special Conditions

Recognizing the difficulty applying one set of specific design standards to a diverse and dynamic setting such as a waterway, the following special conditions have been identified as guidelines for compliance/variance considerations.

A. Decreases in Setback

1. A building setback may be reduced based if elevation changes between the water and the land to be developed are substantial, resulting in a separate upland habitat, i.e. dry bluffs, with steep streamside slopes greater than 25% resulting in building sites 25 feet or more above the ordinary high water mark. In those cases where the flood plain and riparian corridor is distinctly defined by topography, a variance from the setback restriction may be issued that avoids disturbance to the exposed slope, makes reasonable allowances for channel migration, and minimizes visual impacts of new buildings when viewed from the waterway immediately above and below the building site. Under no circumstances will an extension of a building, porch, or deck be allowed to hang out over the bank.
2. A building setback may be reduced and a variance issued in exchange for concessions from a property owner that furthers the intent of this Ordinance. For example, due to unique environmental conditions associated with a building site, relaxing the setback restrictions may allow for an overall net gain in impact mitigation.

B. Increases in Setback

1. A building setback may be increased to satisfy prevailing public health and safety concerns associated with sanitation, potential channel migration, and floodplain management regulations.

Section 9. Variance Process

The applicant may appeal a planning staff decision of conditional approval or denial by seeking a variance. Variance applications shall be submitted, reviewed, and acted upon as follows:

- A. Sixteen copies of the variance application shall be submitted to the County Planning Office at least 20 working days before the next scheduled Planning Board meeting. The application must be accompanied by a review fee as set by resolution by the County Commissioners.
- B. A variance application shall include the original permit application including the results of any required independent professional engineering review, the County Planner's notice of conditional approval or denial, and a narrative addressing the three review criteria established by the Montana Supreme Court for the granting of variances:
 1. The variance would not be contrary to public interest.
 2. Literal enforcement of the Ordinance would result in an unnecessary hardship owing to conditions unique to the property.
 3. The spirit of the Ordinance would be observed and substantial justice done.
- C. The County planning staff shall distribute copies to the Review Board, the Board of County Commissioners, and the County Floodplain Administrator.
- D. The applicant shall allow County representatives, project engineers and other involved local, state, and federal officials or Review Board members access to visit the site while reviewing the proposed application. These onsite visits may be subject to the Montana Open Meeting Law (2-3-201, MCA).
- E. The Review Board may consult with pertinent local, county, state, and federal agencies during its review of the variance application. If the initial permitting process did not include an independent professional engineering review, such review may be required. When such review is required, the applicant shall be required to pay all independent professional engineer review fees.
- F. The Review Board shall review the variance application based on the three review criteria established by the Montana Supreme Court for the granting of variances and the Special Standards criteria specified in Section 8.
- G. The Review Board shall consider any mitigation measures proposed by the applicant.
- H. Upon receipt of a completed variance application, including the results of an independent professional engineering review if required, the County Planning Staff will schedule and post a public hearing with the Review

Board for the earliest possible date. A legal notice of the hearing will be placed in the newspaper of general circulation in the county. Said notice should first appear not less than 15 days prior to the public hearing. The notice should run two consecutive weeks. The applicant shall post a notice of the proposed variance request and the public hearing at one or more conspicuous places on the boundaries of the building site. The Review Board shall review the variance request at the public hearing and make a recommendation to the Board of County Commissioners.

- I. One week prior to the public hearing, the County planning staff shall distribute a "Written Findings of Fact" based on the three review criteria to the applicant, members of the Review Board, and the Board of County Commissioners.
- J. The Review Board may amend, add, or delete any portion of the "Written Findings of Fact" as deemed appropriate.
- K. Based on the "Written Findings of Fact", the Review Board shall make a recommendation to approve, conditionally approve, or deny the application to the Board of County Commissioners, in writing within 10 working days.
- L. Within 10 working days of receiving the Review Board's recommendation, the Board of County Commissioners shall approve, conditionally approve, or deny the variance application.
- M. Written notice of the final decision shall be mailed to the applicant by the Board of County Commissioners. If the variance application was denied, the notice shall include an explanation of the basis for the denial. In the event of conditional approval, the applicant must submit a detailed construction plan addressing all conditional requirements prior to the County's issuance of the permit.

~~Section 10. Nonconformities (1)~~

~~Buildings that were lawful prior to adoption and/or amendment of this Ordinance, are allowed to remain or continue. Normal maintenance of a nonconforming building is permitted; including necessary structural repairs provided such repairs do not enlarge the nonconforming building or structure. The right to continue maintaining a nonconforming building shall terminate when:~~

- ~~A. a nonconforming building is removed or razed.~~
- ~~B. a nonconforming building has been damaged by fire, flood, explosion, earthquake, or other occurrence beyond the control of the owner of the building to over fifty (50) percent of the building's fair market value as determined by the last equalized assessment. Under such circumstances, the building shall not be reestablished or reconstructed, except in compliance with the provisions of this section.~~

~~This exception also applies to building envelopes or setback boundaries explicitly established by previous subdivision approval.~~

Section 11. Penalties

Any person, firm, or corporation that violates the provisions of this Ordinance shall be guilty of a misdemeanor and punishable by a fine of up to \$500 and/or a jail term of not greater than six months. Criminal responsibilities of firms or corporations shall be governed by relevant provisions of 45-2-311 and 45-2-312, MCA.

Section 12. Severability

If any part or portions of this Ordinance shall be declared invalid or unenforceable for any reason by a court of competent jurisdiction, the remainder shall nonetheless continue in effect.

These standards shall be construed to be consistent with any federal or state regulations which pre-empt or take precedence over the standards herein. In the event that either federal or state government adopt standards more stringent than those described herein, the more stringent standards shall apply.

Section 13. Exceptions (Proposed draft language) (1 & 2)

With the following exceptions, building setbacks pertain to all new building construction or alteration activities. A site inspection by the planning office staff is required to determine eligibility for exceptions.

Exceptions:

- a. **A pre-existing building may rebuild and/or expand subject to the following:**
 1. **New construction shall not be any closer to a regulated stream than the pre-existing building.**
 2. **A pre-existing building that has been destroyed may be rebuilt and expanded at the same location. If the building is expanded, it shall not be located any closer to a regulated stream than the pre-existing building.**
- b. **Building sites fronting on ephemeral streams**
- c. **Building sites where setback boundaries and/or building envelopes were established and approved by prior subdivision review processes, including variances.**
- d. **Landscaping, fencing, road building, or grading activities.**
- e. **Irrigation structures and buildings**
 1. **Narrow lot provision (still under consideration, exception or special condition) in the event a proposed setback restriction exceeds the**

depth of an existing lot, thereby rendering the lot potentially un-buildable, a site specific minimum building setback shall be established equivalent to the lesser of the following three setback options:

1. Precedent-based: average setback of established buildings within ¼ mile of the proposed building site, or
2. Half-the-maximum depth: ½ the maximum depth of the property as measured from the ordinary highwater mark, or
3. 100 foot minimum

PASSED BY THE BOARD OF MADISON COUNTY COMMISSIONERS and signed after the First Reading, this ____ day of _____, 2008.

This Ordinance shall take effect as of _____.

PASSED BY THE BOARD OF MADISON COUNTY COMMISSIONERS and signed after the Second Reading, this ____ day of _____, 2008.

Madison County Clerk & Recorder

[SEAL]

¹ Changes made per steering committee recommendation, June 10, 2008 meeting

² Recommendation of planning staff, July 2, 2008

EXHIBIT A.

PLANNING AREA MAP

MARK-UP VERSION